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In The

Supreme Court of the United States

October Term, 1980

No. _____

ANGELO C. PAPPALARDO, et al.,

Petitioners,

—against—

LEO M. SHORE,

Respondent,

—against—

PARKLANE HOSIERY COMPANY, INC., and
HERBERT N. SOMEKH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below erred in approving an inadequate class action settlement which gave no weight to the significance of this Court's decisions in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979), holding that the principle of collateral estoppel applies herein with respect to the securities fraud established by the Securities and Exchange Commission in the corporate freeze-out giving rise to this action and in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) which permitted recovery of profits from a wrongdoer in a 10b-5 action.

2. Whether the court below erred in approving a proposed class action settlement without first resolving issues involving substantial irregularities in the negotiation of a class action settlement in accordance with the decision by the

United States Court of Appeals for the Seventh Circuit in General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106 (1979), cert. den., 444 U.S. 870.*

* The parties to the proceeding in the United States District Court were Leo M. Shore, class representative, Respondent herein; Parklane Hosiery Company, Inc. and Herbert N. Somekh, Respondents herein; and Angelo Pappalardo, et al., a group of approximately 70 individual stockholders.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

ANGELO C. PAPPALARDO, et al.,
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- against -

LEO M. SHORE,
Respondent,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Angelo C. Pappalardo, et al., respectfully pray that a writ of certiorari issue to review the decision entered herein of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the

Southern District of New York, dated August 1, 1980, approving a proposed settlement of this action is reproduced at Appendix A. The judgment and order of that same court, entered September 11, 1980, is reproduced at Appendix B. The order amending judgment of that same court, entered October 16, 1980, is reproduced at Appendix C. The order appealed from, an order of the United States Court of Appeals for the Second Circuit, entered March 18, 1980, is reproduced at Appendix D. None of these opinions has been reported.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Second Circuit was entered on March 18, 1981. This Court has jurisdiction to review this order by a writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. §1254(1); 15 U.S.C. §78aa; Sections 10(b), 13(a), 14(a), and 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. §§78j(b), 78m(a), 78n(a) 78t(a); and Rule 23(e) of the Federal Rules of Civil Procedure are set forth in Appendix E, infra. No Constitutional provisions are involved.

STATEMENT OF THE CASE

A. History of the Case.

This petition for certiorari arises from an order by the United States Court of Appeals for the Second Circuit (hereinafter the "Second Circuit") entered March 18, 1981, which affirmed a final judgment and order of the United States District Court for the Southern District of New York (hereinafter the "District Court"), entered September 11, 1980, approving a proposed settlement of this class action. The preceding history of

the case is described by the District Court in its memorandum opinion and order entered August 1, 1980 in Appendix A at pp. A-4-A-15.*

B. Basis for Federal Jurisdiction in the Court of First Instance.

Federal jurisdiction in the court of first instance was conferred by 15 U.S.C. §78aa and principles of pendent jurisdiction.

C. Facts Material to the Consideration of the Questions Presented.

Petitioners are a group of approximately 70 stockholders of Parklane Hosiery Company, Inc. (hereinafter "Parklane"), who hold approximately 25,000 shares. They, therefore, represent approximately 10% of the total class. Because only ap-

* The Securities and Exchange Commission enforcement proceeding on the Parklane freezeout is reported in Securities and Exchange Commission v. Parklane Hosiery Co., Inc., 422 F.Supp. 477 (S.D.N.Y. 1976), aff'd, 558 F.2d 1083 (2d Cir. 1977).

proximately 50% of the total class has responded to respondents' notices of the proposed settlement, petitioners constitute approximately 20% of the active class.* Petitioners also are parties in a New York State appraisal proceeding.

In this Court's prior decision in Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979), it was held that the following findings by the SEC were established herein by the doctrine of collateral estoppel:

> ". . . (1) that the September 24, 1974 proxy statement failed to disclose that the 'overriding purpose for the merger was to enable Somekh to repay his personal indebtedness,' (2) that the proxy statement was also false in stating that there were 'no negotiations at present' with the Federal Reserve Board of New York with respect to cancellation of Parklane's lease of property from the Board when in fact negotiations were

* Thus, petitioners are not "a relatively small minority of the class," as the Second Circuit concluded. See Appendix p. A-95.

> continuing in early October 1974 and the Federal Reserve Board's representative had agreed to recommend payment of $1,200,000 to compensate for the loss caused by the cancellation, of which $300,000 would be payable to Parklane as its share, and (3) that the proxy statement was misleading in that it failed to disclose that the appraisers, Thomas & McKinnon, Auchincloss & Kohlmeyer, Inc., had not been informed of certain facts pertinent to their evaluation of Parklane shares, including Somekh's plan to use $1 million of corporate assets to reduce his personal indebtedness, his intentions to sell certain real property to Parklane and of the negotiations with the Federal Reserve Board with respect to cancellation of the leasehold." Shore v. Parklane Hosiery Co., Inc. and Somekh, 565 F.2d 815, 817 (2d Cir. 1977).

These three false statements or nondisclosures also were held to be "material". Id., 565 F.2d at 517-18.

The freeze-out* yielded over

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* Noted scholars from Harvard and Yale law schools have characterized Somekh's actions as a particularly egregious example of such a freezeout. Brudney and Chirelstein, "A Restatement of Corporate Freezeouts", 87 Yale L.J. 1354, 1368 n.26 (1978).

$1,000,000 of interest-free 1974 funds to Somekh, used to pay off personal debts arising in part from various real estate investments, and gave him a corporate treasury to finance his ensuing litigation costs. For all of this, Parklane (not Somekh) will pay only approximately $285,000 in 1981 dollars under the settlement.

Class counsel negotiated most of the settlement without the knowledge of petitioners' counsel and presented it to them as a fait accompli, despite their prior entry of an appearance herein. The settlement prejudices petitioners, because it dismembers the class, rendering it impotent for effect litigation (Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980)) and gives defendants an infinite capacity to delay determination of their rights.

The parties entered the settlement after this Court granted defendants' petition for certiorari Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815 (2d Cir. 1977). However, the parties to that appeal never advised this Court of the settlement. The appeal was decided in Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979). Later, the settlement was renegotiated to increase class counsel's fee and to provide interest on the settlement fund, but with no modification in the base amount.

The proposed settlement was submitted to the District Court on June 27, 1980. The subsequent history is shown in Appendices A through D.

REASONS FOR GRANTING THE WRIT

I. The decision of the court below conflicts with the Supreme Court's decisions in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) and in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

In In re Traffic Executive Association - Eastern Railroads, 627 F.2d 631 (2d Cir. 1980), the Second Circuit set forth the following guidelines for determining whether a District Court judge had properly evaluated a proposed class action settlement:

> "In the exercise of this discretion, the most significant factor for the district judge is the strength of the plaintiff's case balanced against the settlement offer . . . . Although the district judge in striking this balance should not convert the settlement hearings into a trial on the merits, he is required to explore the facts sufficiently to make an intelligent comparison between the amount of the compromise and probable recovery." Id. at 633 (emphasis added)

Under these guidelines, the trial court's

definition of the "potential recovery" is the basis from which the rest of the analysis must flow.

In the instant case, with the exception of amendments involving interest and counsel fees, the proposed settlement was negotiated prior to trial, prior to this Court's final determination on the issue of collateral estoppel, and, therefore, prior to a final determination of liability. The lack of finality had two limiting effects upon the potential recovery. Firstly, there was less potential for the recovery, because, had collateral estoppel been held not to apply herein, a factfinder might not have found that the proxy omissions and misrepresentations had occurred. Secondly, a success by counsel in establishing liability at trial would result in an increase in counsel's ultimate fee request to reflect the time and effort necessitated therein, thereby decreasing

the ultimate recovery to the shareholders, because fees are paid out of the recovery.

This Court's decision in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) eliminated these two weaknesses in plaintiff's position. Liability was established certainly and finally without counsel's having to devote the time to trial preparation.*

In addition to eliminating weaknesses from plaintiff's case, this Court's decision resulted in a tremendous potential increase in the amount of the recovery by raising the possibility that defendant Herbert N. Somekh (hereinafter "Somekh") account for and disgorge the personal pro-

* Admittedly, counsel for the plaintiff still would be required to prove causation and damages. However, the District Judge stated: "On balance, I am skeptical of defendants' ability to sustain a defense based upon the issues of causation or damages." Appendix A at p. A-52.

fits and benefits he realized from the fraudulent freezeout. This claim for restitution for unjust enrichment flows out of the facts established herein by collateral estoppel and referred to above at pp. 5-6, coupled with the measure of damages described in the Affiliated Ute Citizen case.

The District Court referred to this claim as follows (Appendix A, pp. A-28-30):

> "One of the appraisal group's principal criticisms is that class counsel have given no consideration to -- indeed, have not even sought discovery concerning -- a dramatic theory of recovery said to arise from Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910 (1969). In Diamond the New York Court of Appeals held, as a matter of first impression, that in a derivative action commenced by a stockholder, 'officers and directors may be held liable to their corporation for gains realized by them from transactions in the company's stock as a result of their use of material inside information.' 24 N.Y.2d at 496, 301 N.Y.S.2d at 79. Diamond upholds the legal sufficiency of the complaint in a stockholder's derivative suit seeking to compel an

> accounting from officers and directors who allegedly profited from sale of the corporation's stock prompted by inside information, in breach of their fiduciary duty. Within the context of the present case, the question is whether the Diamond theory of liability may be transplanted, flourish and bear fruit in a shareholder's class action seeking damages resulting from misrepresentations in a proxy statement, in violation of federal securities laws."

Having thus stated the issue, the District Court said "I find this to be a most doubtful proposition" after a discussion focusing primarily on the difference between the derivative form of the Diamond action and the non-derivative form of this class action.

We respectfully submit that the District Court erred in treating the procedural form of the action as the principle of the case. Instead, as stated by Dean Niles in the Fourth Mortimer H. Hess Memorial Lecture, "A Contemporary View of Liability for Breach of Trust," published in 29 Record of the Association of the Bar of

the City of New York 573, 577 (1974), the "animating principle" of Diamond v. Oreamuno is not of recent origin but goes back to the restitutionary remedy for unjust enrichment of a wrongdoer articulated in the classic opinion of Chief Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) -- a case which was not a derivative suit. To the extent that Diamond v. Oreamuno presents a departure, the new departure is not in the form of the action, but in the application of a time-honored principle to a situation not present in the instant case, namely, that liability for profits was held to lie even in the absence of any damage to the plaintiff.

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1979), like the case at bar, is also a Rule 10b-5 case and not a derivative suit. The measure of damages was described by this Court as follows

(406 U.S. at 155):

> "In our view, the correct measure of damages under §28 of the Act, 15 U.S.C. §78bb(a), is the difference between the fair value of all that the mixed-blood seller received and the fair value of what he would have received had there been no fraudulent conduct, (citation omitted) except for the situation where the defendant received more than the seller's actual loss. In the latter case damages are the amount of the defendant's profit. (emphasis added)

Thus, this Court confirmed that the same measure of damages available under state law in Diamond is also available under federal securities law.

The artificiality of the distinction made by the District Court between Parklane and Somekh for the purpose of this cause of action is readily apparent given that the Somekh control group, by virtue of the freeze-out, changed from being owners of over 70% to owners of 100% of the stock of the corporation solely to effect Somekh's personal financial plan. In these circumstances, a derivative suit is

obviously not an efficacious remedy for the victimized minority stockholders. Such a suit would merely transfer funds from one pocket to another in the same pair of pants worn by Somekh.

New York State's highest Court, in deciding Diamond v. Oreamuno, did not intend that the doctrine of the case should turn on the form in which the action was brought, i.e. derivative or class action. The opinion displays the opposite intention. It refers (24 N.Y.2d at 504) specifically to the uncertainties of federal securities causes of action, "including the measure of damages, the administration of the fund which would be recovered and its distribution to the members of the class". On the grounds of these uncertainties the Court sanctions the Diamond v. Oreamuno cause of action as an additional remedy under the New York corporation law (ibid.):

> "In view of the practical difficulties inherent in an action under the federal law, the desirability of creating an effective common-law remedy is manifest . . . Only by sanctioning such a cause of action will there be any effective method to prevent the type of abuse of corporate office complained of in this case." (emphasis added)

Given this strong statement by New York's highest Court, one might question whether the District Court's skeptical attitude properly reflects the comity required by our judicial system in the interaction between state and federal laws.

The significance of Diamond v. Oreamuno, supra, as a restitutionary remedy for unjust enrichment, also is discussed in Palmer, Law of Restitution, §2.11 at pp. 152-153 (1978). As Professor Palmer points out therein, the essential principle in Diamond applicable to the case at bar is that the unjust enrichment of an intentional wrongdoer is generally regarded as recoverable. (Id. at §2.12) And the

cause of action for intention wrongdoing is not a derivative cause of action but belongs instead to the targets of the intentional wrongdoing, here, the minority stockholders. Also see, Note, "From Brophy to Diamond to Schein: Muddled Thinking, Excellent Result" in 1 Journal of Corporation Law, 83, 92 (Fall 1975) stating:

> "In a suit to recover for a violation of a strict trust, the real plaintiff . . . is the corporation . . . In a suit for deceit, however, the real party in interest is the shareholder who was defrauded by the misstatement or omission of the person guilty of deceit. The recovery belongs to the shareholder directly." (Footnotes omitted.) (emphasis added).

The restitutionary considerations noted above also have been applied by federal courts in decisions other than Affiliated Ute Citizens. In S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 37 (2d Cir. 1979), the Second Circuit reversed the District Court's dis-

missal of a complaint and upheld a cause of action for restitution for unjust enrichment. In that case, a contractor performed under a construction contract only to be stopped when the work was 90% complete. Because the Department of Housing and Urban Development ("HUD") utilized a shell corporation to enter into the contract, which HUD carefully avoided signing, the contractor sued the Secretary of HUD for restitution for its unjust enrichment based upon the value of the services that had been performed. HUD contended that, because HUD was not a party to the contract, and had no direct dealings with the contractor, it could not be held liable for restitution of its unjust enrichment in an action brought by the contractor. This contention is obviously analogous to the claim herein that the minority shareholders victimized by Somekh's wrong doing may not press a direct claim against

him.

The contention, which was described as the "nub of the case" in Silberblatt, was rejected. 608 F.2d at 40:

> ". . . HUD cannot avoid paying for a benefit received by it as the real party in interest by maintaining a formal distinction between itself and its robot, the project owner who is the nominal party to the contract with the contractor . . ."

Similarly, Somekh cannot escape personal liability to the minority stockholders on the theory that his robot, the corporation which he controlled in every respect, insulates him from liability for his own unjust enrichment.

Numerous additional federal cases apply these restitutionary principles. Securities and Exchange Commission v. Penn Central, 450 F.Supp. 908, 916 (E.D. Pa. 1978) (disgorgement of proceeds from wrongful conduct is a discretionary equitable remedy); Nelson v. Serwold, 576 F.2d 1332, 1339 (9th Cir. 1978) (disgorgement of unjust enrichment of defendants is a-

vailable as a remedy for material omissions in the disclosure of corporate plans, because the policy of the law is to avoid rewarding "those who conceal their misconduct."); Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 95 (2d Cir. 1978); Marcus v. Otis, 168 F.2d 649, 654 (2d Cir. 1948) (Learned Hand, J.); Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965), cert. den., 382 U.S. 870 (the Court held that recovery of the unjust enrichment of the wrongdoer is available as a remedy in a class action, stating that "[it] is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them.").

The rule of Janigan v. Taylor, supra, was specifically approved by this Court in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

On the basis of the foregoing authorities, petitioners respectfully submit that District Court abused its discretion in failing to factor defendant Somekh's liability into its evaluation of the potential recovery available in the case. A court evaluating the fairness of a proposed settlement must consider the terms in the light of the circumstances that exist at the time the proposed settlement is presented for consideration, not at the time it was negotiated. See Newman v. Stein 464 F.2d 689, 696 (2d Cir. 1972):

> ". . . it would be inappropriate for a reviewing court to freeze matters as of the moment at which the parties entered into an agreement and ignore subsequent developments which either enforce or undermine the original agreement to settle."

Petitioners herein respectfully submit that the lower court herein failed to accord adequate significance to this Court's collateral estoppel decision in

evaluating the settlement. As shown above, that decision, coupled with the Affiliated Ute Citizens case, significantly strengthened plaintiff class's case by eliminating the necessity to try certain issues, by decreasing the ultimate fee award, thereby enlarging the recovery, and by opening the door for a potentially extensive source of damages for the class from defendant Somekh. The result is to undermine the effectiveness and deterrent function of our system of securities laws.

II. The lower court's decision is in direct conflict with the decision of the Seventh Circuit in In re General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106, cert. den., 444 U.S. 870, in evaluating the proposed settlement without first resolving substantial issues relating to irregularities in the settlement negotiations by means of a preliminary hearing.

In In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106,

1124 (7th Cir. 1979), cert. den., 444 U.S. 870 (hereinafter, "General Motors"), the Seventh Circuit, in reversing the trial court's approval of a proposed settlement, said:

> "We think that the conduct of the negotiations was relevant to the fairness of the settlement . . .
>
> "This court has several times commented on the trial court's continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation. [Citation omitted] The trial court's duty is heightened by its responsibility to review the fairness of any compromise of the class action." [Citation omitted]."

And, at footnote 21, the Seventh Circuit quoted with approval from 89 Harv. L. Rev. 1318, 1337-38:

> "Before approving a settlement, therefore, the judge must assure himself that the class has been adequately represented during the settlement talks, a conclusion which will not follow automatically from a finding of adequacy for litigation purposes.

The Seventh Circuit relies in part upon the Manual for Complex Litigation as

authority for its view that a preliminary inquiry into settlement negotiations is required prior to sending notice of the settlement to the classmembers and weighing the fairness of its terms. Id., 594 F.2d at 1124. The application of the Manual herein is established by language in Section 0.22 thereof, where it refers to:

> "(f) individual stockholders', stockholders' derivative, and stockholders' representative actions; . . . (h) cases arising as a result of prior or pending Government litigation; (i) multiple or multidistrict litigation; (j) class actions or potential class actions; or (k) other civil and criminal cases involving unusual multiplicity or complexity of factual issues." But cf., Shore v. Parklane Hosiery Co., Inc., 606 F.2d 354, 358 (2d Cir. 1979).

Multiple litigation is involved here. The freezeout led to this action, a state appraisal proceeding, and an SEC proceeding, wherein the District Court denied the SEC's request to appoint a Special Counsel to value

Parklane shares on the ground that the appraisal proceeding was performing this very function. Securities and Exchange Commission v. Parklane Hosiery Co., Inc., 422 F.Supp. 477, 486 (S.D.N.Y. 1976).

The Manual directs that a preliminary hearing concerning the negotiations should be held by the reviewing judge prior to mailing notices of the proposed settlement to the classmembers. In Section 1.46, the Manual provides:

> . "At such a hearing the Judge should learn the circumstances surrounding the negotiations and hear not only from the parties who participated in the negotiations but as well from those, if any, who were left out of the negotiations."

Among the inquiries to be pursued at such a hearing, the Manual recommends the following, which are directly relevant to the instant case:.

"(1) At what stage in the proceed-

ings was the proposed settlement achieved?

"(2) Has there been any development of facts through discovery or otherwise on which estimates of the probability of liability and the range of possible damages can be made?

"(3) Can the proponents of the settlement submit data to establish at least preliminarily the reasonableness of the proposed settlement?

"(4) Who were the negotiating parties and to what extent were they authorized to proceed with the settlement of their class claims and possibly those of other classes?

"(5) Did all counsel for all parties participate in the negotiations and, if not, what are the views of the nonparticipating parties and counsel?"

In General Motors, the Seventh Circuit held that the District Court abused its discretion in not maintaining such a hearing and developing a sufficient record to demonstrate lack of prejudice to the class in the course of the negotiations. General Motors, supra, 594 F.2d at 1124. Such was the case herein.

The District Court made no findings that:

(1) class counsel was informed about the value of the claims he was surrendering, a key factor emphasized by the Seventh Circuit. Id., 594 F.2d at 1128;*

(2) class counsel had sufficiently developed facts through discovery to estimate recovery, a factor noted in the Manual and Saylor v. Lindsley, 456 F.2d 896, 899, 901 (2d Cir. 1972);

(3) petitioners were not prejudiced by defendants' negotiating a federal court settlement which provided for abandonment of petitioners' state court claims with class counsel herein, who has demonstrated no familiarity with the record of the ap-

* The District Court noted that class counsel "had available" the evidence from the appraisal proceeding, but no finding, nor any evidence, indicated that class counsel had any substantial familiarity with the transcript or utilized the information. App. A, p. A-48.

praisal proceeding, rather than petitioner's counsel. Defendants succeeded in a strategy of "attorney-shopping" and divide and conquer; tactics condemned by the Seventh Circuit. Id., 594 F.2d at 1125 and at n. 26;

(4) petitioners were not prejudiced by class counsel's violation of his professional obligation to inform petitioner's counsel, who had filed an appearance for petitioners in this action, of the settlement negotiations from the outset, rather than presenting them with a tentative settlement several months after the negotiations commenced. Respecting this breach of obligation, the Seventh Circuit stated:

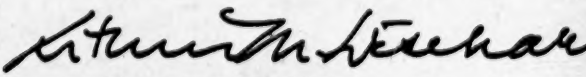
> "Moreover, even if discovery [regarding negotiation of a settlement] failed to reveal identifiable prejudice, the exclusion of private counsel from the settlement negotiations should weigh heavily against approval of the settlement." General Motors, 594 F.2d at 1126.

On the basis of the foregoing, we respectfully submit that the lower court abused its discretion in failing to follow the Seventh Circuit's holding in General Motors reversing the lower court's approval of the proposed settlement for failure to conduct a proper preliminary hearing.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,



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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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74 Civ. 4986-CSH

MEMORANDUM OPINION AND ORDER

LEO M. SHORE,

Plaintiff,

- against -

PARKLANE HOSIERY COMPANY, INC., and HERBERT N. SOMEKH,

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HAIGHT, District Judge:

This case, certified as a class action under Rule 23, F.R.Civ.P., is before the Court on class counsel's application for approval of a compromise and allowance of attorneys' fees. Rule 23(e). The proposed settlement is urged by class

counsel and the defendants; approved in principle, subject to relatively minor adjustments, by the class representative and other class members who share his views; and opposed in its entirety by class members who were granted a limited right of intervention for the purpose of participating specially in the settlement proceedings. These intervenors also move to replace the class representative and his counsel; attack the adequacy of the notice given; and move for a stay of the hearing on the proposed settlement until appraisal proceedings they commenced in state court have been completed.

Having considered the affidavits, exhibits, briefs and oral argument of counsel, I deny the intervenors' motions, and approve settlement of the class action on the terms set forth in this opinion.

I.

History of the Litigation

This case has a lengthy history. Some recapitulation is necessary to place the present motions in context. I could not improve upon Judge Van Graafeiland's following summary for the Second Circuit in Shore v. Parklane Hosiery Co., Inc., 606 F.2d 354, 355-6 (2d Cir. 1979):

> "In 1974 Parklane Hosiery Co., Inc., issued a proxy statement in connection with its planned going-private 'freezeout' merger. The statement contained an offer to purchase shares from the frozen-out shareholders at $2.00 per share. Ninety percent of the shareholders accepted the offer; the other ten percent dissented and began an appraisal proceeding in the New York courts pursuant to section 623 of the New York Business Corporation Law to determine the fair market value of the stock, which they estimate at over $10 per share. The appraisal proceeding, begun in 1975, has not yet been concluded.

"Shortly after the merger was authorized, Leo Shore filed the instant securities action, alleging violations of the proxy solicitation laws by Parklane and its directors. The district judge granted class certification, and the required notice issued to all class members, including those involved in the appraisal proceeding (the appraisal group). After the SEC successfully prosecuted a parallel enforcement action against these defendants, Shore moved for, but was denied, summary judgment on the ground of collateral estoppel. We reversed, and the Supreme Court granted certiorari.

"The parties then entered into the settlement agreement, which provides that Parklane will create a $205,000 fund from which $65,000 will be paid to Shore's attorneys and the remainder distributed to the shareholders. The settlement agreement also provides that members of the appraisal group may opt out of the class prior to judicial approval of the settlement without prejudice to the continued pursuit of their individual claims.

"When the parties appeared before the district judge to work out the procedure for approving the settlement, the appraisal group sought to intervene as of right under Rule 24(a)(2), and as a matter of

discretion under Rule 23(d)(2), for the purpose of moving for a stay pending resolution of the appraisal proceeding. Alternatively, they requested a hearing on the adequacy of Shore's representation. They alleged that Shore's attorney had inadequate knowledge of the stock's actual fair market value, that Shore himself was in league with defendant Somekh, and that the settlement negotiations were conducted secretly in order to avoid any confrontation with the appraisal group. Appellees disputed the truth of these allegations, contending that Shore and Somekh barely knew each other, that the appraisal group's estimate of the stock's fair market value was nothing more than wishful thinking, and that, in any event, the appraisal group had no right to complain because its members were adequately protected by the opt-out provision of the settlement agreement.

"On November 21, 1978, the district judge denied the motion for full intervention but granted appellants limited intervention for the purpose of participating in the settlement approval hearings. The district judge also denied the alternative motion for a preliminary hearing but required that the proposed settlement notice be amended to state in more explicit detail the relief demanded in the complaint. The appraisal group filed

this appeal on December 20, 1978.

"On January 9, 1979, the Supreme Court affirmed our determination that defendants' liability was established conclusively by the collateral estoppel effect of the earlier SEC action. On February 20, 1979, the district judge tentatively approved the settlement notice, which had been modified in accordance with the November 21 order, and stayed further proceedings pending this appeal."

More Recent Events

On September 12, 1979 the Court of Appeals held, in the cited decision, that this Court's order granting the intervenors (hereinafter the "appraisal group") a limited right of intervention was not appealable. This Court summoned class counsel[1] and counsel for defendants[2] to a conference in chambers on October 16, 1979, for the purpose of inserting dates in the notice of hearing, the text of that notice having been adjudicated (after con-

sidering the appraisal group's submissions)[3] in the February 20, 1979 opinion.

At the October 16, 1979 conference, class counsel advised the Court for the first time that on September 28, the appraisal group had filed a petition for reargument and rehearing en banc. This had the effect of staying the Court of Appeals' mandate. Rule 41(a), F.R.App.P. In consequence, this Court was still not in a position to schedule the hearing, or authorize issuance of a notice to the class. Also at the October 16 meeting, counsel advised the Court that the named plaintiff, Leo M. Shore, had expressed dissatisfaction with the terms of the settlement. That dissatisfaction arose primarily from the delay encountered since the date of the original stipulation of settlement, namely, May 12, 1978. Steven Shore, the son of Leo Shore and a prac-

ticing attorney, attended the October 16, 1979 meeting to express his father's views. Counsel advised the Court that defendants had agreed to increase the interest factor in the proposed settlement from the initial provision (5% per annum from the date of the order approving the settlement) to 10%, from June 1, 1978. Steven Shore stated that his father considered that increase insufficient. Class counsel also raised the possibility of an increase in the ceiling on possible attorney's fees, from the $65,000 figure specified in the original stipulation of settlement.

The Court of Appeals denied the appraisal group's petition for rehearing on December 5, 1979, and ordered the issuance of its mandate forthwith. The way was thus cleared for further proceedings in this Court on the proposed settlement. On January 31, 1980, class

counsel and defendants' counsel met with the Court in chambers to consider scheduling, and final revisions to the text of the notice. The principal revision related to the present position of Leo Shore, which the notice described as follows:

> "Mr. Shore has indicated that, by virtue of the Supreme Court decision referred to above, the status of the appraisal proceedings and the diminution of the value of money since the proposed settlement was negotiated, he no longer supports the proposed settlement described in this notice. Counsel for the class and for the defendants continue to support the settlement as fair and reasonable, and note that the terms of the proposed settlement as originally submitted to the Court in May, 1978, have been changed to require payment by Parklane of interest on the settlement fund as originally defined at the rate of 10% per annum from June 1, 1978."

In addition to reflecting the increase in the interest factor described ante, the

notice recited defendants' agreement not to oppose attorney's fees not in excess of $85,000 (up from the original $65,000), plus "an amount equal to such portion of the interest which is a part of the settlement fund as the fee approved by the Court bears to the principal amount of the settlement fund."

These increases were also set forth in the Court's order of February 15, amending the stipulation of settlement.

The notice, as approved by Court order of February 14, set the hearing on the proposed settlement for April 18, 1980. Class members desiring to opt out were required to file and serve a statement of election not later than April 8. Objections to the settlement were due the same day. The order required mailing of the notice to class members not later than March 3, as well as publication of

the notice. By order dated March 5, the Court permitted publication of a summary of the notice, rather than the full text.

On March 3, 1980, counsel for the appraisal group wrote to the Court to express surprise and disapproval that the notice had been sent, and a hearing scheduled for April 18, without their further participation. It is the fact that counsel for the appraisal group were not included in the October 16, 1979 and January 31, 1980 chambers conferences. Class counsel and defendants' counsel responded that there was no reason why the appraisal group's counsel should have attended those conferences. I discuss that question post. On March 18 the appraisal group moved to further intervene for the purpose of moving for orders:

> "...disqualifying counsel for the class herein, substituting Mrs. Kay Grant as a new class representative, disqualifying

> the representative for the class herein, requiring appointment of new counsel for the class representative, requiring corrective notice to be sent to the class-members, enjoining the hearing on the fairness of the proposed settlement, and for such other, further and different relief as the Court deems just and proper so as to protect the interests of the shareholders in this action."

While decision on those motions was pending, the Court received a letter dated April 3, 1980 from Mr. James R. Foster, Jr., a member of the appraisal group, and a stockbroker whose clients or associates are also members of that group. Mr. Foster advised that a number of members of the appraisal group had not yet received copies of the notice. Mr. Foster expressed justifiable concern, in view of the April 8 deadline for opting out of the settlement.

Counsel for defendants, also alerted to this problem by counsel for the appraisal group, advised the Court by letter

dated April 7 that notices had been mailed to each Parklane shareholder of record as of September 14, 1974, as shown on records certified by the corporation's then transfer agent. Counsel for defendants had also identified additional beneficial shareholders from the files of class counsel. The difficulty apparently lay in the fact that the shares of a number of appraisal group members were held in street name by the firm of Tucker, Anthony & R.L. Day, Inc. (Mr. Foster's firm), or a depositary firm of that firm. Counsel for defendants sent further instructions to their mailing firm, directing mailing of notices to all members of the appraisal group who were not shareholders of record on the record date, and thus not included in the original mailing. With leave of Court, the date for opting out was extended to April 18, date of the hearing.

By endorsement dated April 14, the Court granted the appraisal group's motion to further intervene for the purpose of the additional motions summarized ante; denied the motion to enjoin the hearing on the proposed settlement; and directed that the other proposed relief be considered among the issues to be raised at the hearing.

II.

It is first necessary to address the appraisal group's motion for further relief, since if they are well founded the proposed settlement can be neither considered nor approved.

Disqualification of Class Counsel

The appraisal group moves for disqualification of the Kass, Goodkind firm as class counsel on the basis of five

asserted errors of omission or commission (brief of March 17, 1980, at 5-6). These criticisms overlap. There are two principal complaints: class counsel did not sufficiently involve counsel for the appraisal group in the promulgation of the settlement notice and scheduling of the hearing; and class counsel suffers from an incurable conflict of interest because the class representative, Mr. Shore, no longer supports the settlement.

While counsel for the appraisal group contend that they were denied a right of participation, contrary to the Court's prior orders, no such deprivation occurred. Counsel for the appraisal group made their views known at length on the proper text of the settlement notice. Their contentions were adjudicated in this Court's opinion of November 21, 1978; see pp. 6-7. Certain modifica-

tions in the notice were ordered. The appraisal group participated further in hearings giving rise to the Court's opinion of February 20, 1979, which approved the text of the notice: after another full hearing, "[t]he appraisal group's objections, both new and old, are rejected." Id. at 4. The only subsequent changes in the notice relate to the insertion of dates for the hearing, and for opting out or filing objections -- a scheduling function which class counsel and counsel for the defendants were clearly able to perform, subject to Court approval, without input from the appraisal group -- and the references to Mr. Shore's opposition to the settlement and the increase in the interest factor and possible attorneys' fees, discussed ante. The notice accurately set forth the facts. The Court would not have approved it otherwise.

Participation of the appraisal group was not necessary. They remained free, under the Court's intervention order, to contest the settlement on its merits.

The conflict of interest the appraisal group perceives, arising out of Shore's opposition to the settlement, exaggerates the position of the class representative. Shore approves the settlement's main thrust: distributions of a cash fund now, instead of the continued uncertainties of litigation. Shore is entirely opposed to the appraisal group's objective, namely, deferring resolution of the class action until the appraisal proceeding has run its course. Shore's position in respect of the settlement is developed further under Point III, post. It is sufficient to say, in the present context, that Shore limits his opposition to the requests that the interest factor be in-

creased from the proposed 10 percent to a rate more closely resembling the recent high prime rates of interest (Shore brief at hearing at 4); and that defendants be required to increase the fund "by an amount sufficient to compensate class counsel for its services subsequent to July, 1978" (id. at 5). The Shore brief, at 4, pays tribute on behalf of the class to "the superb legal services provided it by the Kass, Goodkind firm in the course of the Supreme Court proceedings and subsequent litigation in this matter."

In these circumstances, it is quite inaccurate for the appraisal group to say (brief of March 17, 1980 at 11) that "the class representative's view coincides with that of the intervenors, based in part on the status of the Appraisal Proceeding." (emphasis in original). In point of fact, Shore disagrees fundamentally with the in-

tervenors; he finds more in the settlement to praise than to condemn; and speaks of class counsel in terms of unqualified praise. No conflict of interest requiring disqualification of class counsel is present in this case.

Disqualification of the Class Representative

The appraisal group's motion to disqualify Shore as class representative also is based upon his perceived opposition to the settlement. The discussion under the preceding paragraphs is dispositive of this motion as well. The limited nature of Mr. Shore's opposition to the settlement recommended by class counsel does not require his replacement as class representative.

It would be far more disruptive of the orderly resolution of this class suit if I were to accept the suggestion of

counsel for the appraisal group and appoint their client, Mrs. Kay Grant, as substitute class representative. Mrs. Grant would undoubtedly follow her attorneys' advice, and urge that the settlement be shelved until the appraisal proceeding is terminated. That would require Shore and other members of the class who, like him, oppose that chronology to intervene with separate representation: thereby turning the present posture of the case, in respect of intervention, completely upside down. The position of Mrs. Grant, and other members of the appraisal group, are adequately protected by their rights as intervenors to contest the fairness of the settlement. No basis in law or equity exists for unseating Mr. Shore and turning an intervenor into the class representative.

I have considered the appraisal group's other procedural objections and

find them without merit. In particular, I find that counsel for defendants and class counsel exercised reasonable efforts and good faith in sending out notices of the hearing;[4] that such difficulties as arose were not of their making; and that the extension of time for filing statements of exclusion, to and including the date of the hearing, cured any potential prejudice.[5] I also reject the appraisal group's contention that class counsel conducted the settlement negotiations in an improper manner, and committed other improprieties, so as to taint the settlement.[6]

I turn, therefore to whether the proposed settlement should be approved.

III.

Ninety percent of Parklane's shareholders accepted the offer to purchase

their shares at $2.00 per share. The proposed settlement calls for the establishment of a settlement fund of $205,000, plus the 10 percent interest factor previously alluded to, and an increase of $1 per share for each share held by a member of the appraisal group who does not elect exclusion. The interest calculated to August 1, 1980 amounts to $48,000. The increment in respect of participating appraisal group members is estimated at $5,000. Thus the gross settlement fund is $258,000. That is the equivalent of an additional $2.41 per participating share, based upon the number of claims timely filed.[7] Thus each class member participating in the settlement will have made a gross recovery of $4.41 per share ($2.00 original payment plus $2.41 under the settlement), subject to reduction by whatever counsel's fees the Court allows.

The proponents of the settlement (class counsel, counsel for defendants, and class representative Shore, subject to the reservations noted ante), regard this settlement as desirable in the totality of circumstances. The appraisal group opposes it as grossly inadequate.

This Court's proper function was summarized recently in Lowenschuss v. C. G. Bluhdorn, 82 F.R.D. 712, 715 (S.D.N.Y. 1979):

> "In order to approve this proposed settlement, this Court must determine that it is fair, reasonable, and adequate to the absent class members. See, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Beecher v. Able, 72 F.R.D. 518 (S.D.N.Y. 1976). In order to make this determination, the Court is to consider 'the likelihood of establishing liability and the consequent probable reward in damages, balanced against the amount offered in settlement.' Bonime v. Doyle, 416 F.Supp. 1372, 1379 (S.D.N.Y. 1976), aff'd, 556 F.2d 554 (2d Cir. 1977), citing State of West

Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir. 1971), cert. denied sub nom. Cotler Drugs, Inc. v. Chas Pfizer & Co., 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971)."

"The most important factor is the strength of the case for the plaintiffs on the merits, balanced against the amount offerred in settlement." City of Detroit v. Grinnell, 495 F.2d 448, 455 (2d Cir. 1974), quoting West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir. 1970), cert. denied, 404 U.S. 871 (1971). Normally, there is a public policy favoring settlement. Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972). While the Court's approval "cannot be a rubber stamp adoption of what the parties agree is fair and reasonable," Seigal v. Merrick, 590 F.2d 35, 37-8 (2d Cir. 1978), it is equally true that "the court must not turn the settlement

hearing 'into a trial or a rehearsal of the trial,'" Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972), quoting Haudek, The Settlement and Dismissal of Stockholders' Actions, 23 Sw.L.J. 765, 771 (1969). In determining the acceptability of a proposed settlement, "the burden of proof is squarely on the proponents of the proposal." Goldsholl v. Shapiro, 417 F.Supp. 1291, 1296 (S.D.N.Y. 1976). The trial court, after the exercise of its independent judgment, should approve the settlement unless it falls "below the lowest point in the zone of reasonableness." Newman v. Stein, 464 F.2d 689, 698 (2d Cir.), cert. denied, 409 U.S. 1039 (1972).

The proponents of the settlement at bar make a threshold argument. They stress that the appraisal group would not be prejudiced by the settlement because they have been permitted to opt out of the

settlement, and can accordingly pursue their remedies both in the appraisal proceeding and this Court. It follows, the proponents urge, that the appraisal group's objections are entitled to little or no weight.

I cannot accept that view. My prior opinion granted the appraisal group members the right of fully participating in the hearing on the approval of the settlement. I will not devalue that right by inserting ear plugs when counsel for the group address me. Furthermore, I owe an independent duty to those members of the class who have not opted out and will be bound by the settlement; before passing upon the settlement, I must have "apprised [my]self of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." Saylor v.

Lindsley, supra, at 904 (settlement of stockholder's derivative suit), quoting Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968) (compromise of bankruptcy proceeding). I discharge that obligation only by weighing all factual and legal contentions, from whatever source. The duty extends to evaluating not only the claims previously asserted by the proponents of settlement, but such additional or alternative claims as may be available to them which they have not asserted. Saylor, supra, at 901.

One of the appraisal group's principal criticisms is that class counsel have given no consideration to -- indeed, have not even sought discovery concerning -- a dramatic theory of recovery said to arise from Diamond v. Oreamuno, 24 N.Y.2d 910 (1969). In Diamond the New York

Court of Appeals held, as a matter of first impression, that in a derivative action commenced by a stockholder, "officers and directors may be held liable to their corporation for gains realized by them from transactions in the company's stock as a result of their use of material inside information." 24 N.Y.2d at 496, 301 N.Y.S.2d at 79. Diamond upholds the legal sufficiency of the complaint in a stockholder's derivative suit seeking to compel an accounting from officers and directors who allegedly profited from sale of the corporation's stock prompted by inside information, in breach of their fiduciary duty. Within the context of the present case, the question is whether the Diamond theory of liability may be transplanted, flourish and bear fruit in a shareholder's class action seeking damages resulting from misrepresentations

in a proxy statement, in violation of federal securities laws.

I find this to be a most doubtful proposition. Derivative theories of recovery are not available to Parklane stockholders who surrendered their shares for case in the merger. Since such individuals no longer hold shares, they are not qualified to bring a derivative action on behalf of the corporation. Judge Tenney so held in a case arising out of the same nexus of facts, Bernstein v. Somekh, 452 F.Supp. 1373, 1374 (S.D.N.Y. 1978), construing Rule 23.1, F.R.Civ.P. The same rule applies under New York law,[8] and so concepts of pendent jurisdiction, even if otherwise available, add nothing. For these reasons, the appraisal group's reliance on derivative actions such as Marcus v. Otis, 168 F.2d 649 (2d Cir. 1948), is misplaced. Moreover, there is substantial doubt that

the corporation suffered any injury cog-n'zable under federal securities law, since the corporation did not purchase the shares in reliance on material omissions or misstatements, and in any event plaintiffs' theory is that the corporation paid too little for them, not too much. Bernstein at 1375. Furthermore, on a derivative suit it is the corporation, not the individual plaintiffs, to which ill-gotten gains are returned. Thus consenting shareholders, who tendered their shares, would have no claim upon such proceeds. If defendant Somekh is liable to account to his corporation under an Oreamuno theory, that may increase the appraised value of the stock; but the appraisal group, who retained their shares, can pursue those remedies in the appraisal proceeding. Members of the appraisal group may also assert their Oreamuno

theory in this action, an option specifically preserved to them by the settlement.

I need not make a final determination on this issue. It is sufficient for, present purposes to say that class counsel's skepticism of the viability of an Oreamuno claim in the case at bar, in respect of the consenting shareholders (the considerable majority of the class), is entirely justified. It can scarcely be regarded as a promising theory of liability which class counsel is inexplicably neglecting to pursue. Cf. Saylor v. Lindsley, supra, n.6.

It is also pertinent to note that the pursuit of this theory of liability by class counsel would require a considerable additional expenditure of time and effort, extending through pre-trial discovery (which the appraisal group criticizes class counsel for not having con-

ducted to date), and trial. This combination of delay and risk constitutes a traditional argument in favor of settlement. That argument is forcefully expressed by Steven Shore, an attorney experienced in securities law, and advisor to his father, plaintiff Leo Shore.[9] The following colloquy occurred at the hearing on the settlement:

> THE COURT" "...it was suggested on behalf of the intervenors that within the context of the proposed settlement, insufficient focus is being had on the potential personal liability of Mr. Somekh and insufficient regard is being had to theories of liability against him personally as a fiduciary, standing in a fiduciary relationship to stockholders such as your father and your other clients, fiduciary responsibilities which under certain theories of New York law might give rise to such remedies as a petition for an accounting and disgorgement and things of that nature.
>
> "In your criticism of the proposed settlement you do not refer to that particular aspect

of the case. My question is have you, in advising your client and forming your own evaluation, given consideration to those particular theories of liability against Mr. Somekh personally?"

MR. SHORE: "Your Honor, in the papers that I have submitted on behalf of my father and other persons I represent, I indicated that or he indicated that he believed and it is my belief, and this was structured into the settlement process, that if this case went to trial, that substantially more monies would be secured by the class than is being secured now.

"The problem is that you're talking about a number of risks. You're talking about discovery, a trial, appeals, years of delay. And while the specific issue that you just raised was not one that I focused on sufficiently until recently in connection with the earlier decisions as is perhaps customary for lawyers to do, you look at the problems and you look at the process of a case.

"There's no question that I believe that if this case reaches a jury, that more than $205,000 is going to be returned by a jury. The problem is that when you deduct the legal fees and you factor in that you're talking about several years' worth of time

> in appeals, I think the best, and this is where I disagree with the objectants, is that the class would best be served by securing monies, a definite amount now as to the value of the settlement."

Another contention pressed with vigor by the appraisal group is that the proposed settlement does not reflect a sufficient value for the Parklane stock as of October 1974, the date of the freeze-out merger. That is, of course, the issue presently being contested in the appraisal proceeding in state court. The evidence has been taken by a special referee. It appears from the affidavits filed in this Court that the appraisal proceeding has generated thousands of pages of testimony and hundreds of exhibits. The hearing has been completed before the special referee, and briefs were filed in early July. The decision is pending.

The principal witnesses as to valua-

tion who testified in the appraisal proceeding have submitted numerous and detailed affidavits, attack each other's testimony and conclusions, while recapitulating and defending their own. The lead witness on valuation for defendants Parklane and Somekh is Dr. Leopold A. Bernstein, professor of accounting at the Baruch College of the City University of New York. Dr. Bernstein has testified in the appraisal proceeding, and submits to this Court by affidavit, that the fair market value of Parklane shares as of October, 1974 was $1.40 per share. If that figure is correct, the proposed settlement, yielding a gross recovery of $4.41 per share, is obviously desirable. The lead expert witness on valuation for the appraisal group, Nathaniel S. Weiner, a securities analyst, has testified, and repeats in his affidavits, that the fair

value of Parklane stock as of October 13, 1974 was $11.91 a share. If that figure is accurate, the proposed settlement is of course substantially less appealing.

The arguments and contentions put forward in the appraisal proceeding are stated at length in these affidavits. The experts couple their expositions with rancorous, ad hominem attacks upon each other's reputations and integrity. Those unpleasant exchanges mirror certain of the personal charges that have been exchanged between counsel, in this hotly contested proceeding before me. Indeed, at one point in the battle of affidavits, Dr. Bernstein is personally attacked by Dr. Abraham J. Briloff, a fellow professor at Baruch College, who has appeared as a witness for the appraisal group in the appraisal proceedings. Dr. Bernstein, in a reply affidavit, answers Dr. Briloff in

kind. Thus the contentious atmosphere of the courtroom spills over into what one would have thought were the more tranquil recesses of the groves of academe and the faculty lounge.[10]

The conflicting affidavits reflect a myriad of disputed issues of fact. Mr. Weiner, the expert for the appraisal group, argues for further hearings, at which these issues would be further developed. Thus his reply affidavit of June 19, 1980 (¶15), states: "The Bernstein affidavit points up the need for a hearing. Much of what he says is simply irresponsible." As a practical matter, however, there is no way in which such a hearing could be limited. Mr. Weiner wishes to attempt to demonstrate, within the context of this hearing on the proposed settlement, the folly of Dr. Bernstein's reasoning, and the soundness of his own. He would per-

force be cross-examined by counsel for defendants. Dr. Bernstein would then inevitably testify concerning his calculations, and be cross-examined in turn. And because both lead experts rely, in part, upon calculations and opinions stated by others, we could expect the supporting troops who participated in the appraisal proceeding appearing yet again before this Court. I know who those supporting troops are, and what they have to say, because they have all filed affidavits as well.

Such an expanded hearing would duplicate the state court appraisal proceeding. It would entirely frustrate the policy favoring settlement, and would contravene the Second Circuit's direction that the Court not turn the settlement hearing into the very trial which the settlement is intended to avoid.

It is not my function to decide

which appraisal is correct. My function is limited to determining whether or not the proposed settlement falls within the zone of reasonableness. That question must be answered in the affirmative, unless I conclude that the $1.40 per share valuation testified to by Dr. Bernstein on behalf of defendants is so manifestly infirm that no reasonable basis exists for believing that the special referee might accept it, or an amount comparable to it.

I cannot reach that conclusion. The proponents of the settlement have demonstrated that the Bernstein appraisal proceeds from at least arguable theories. The referee may accept those theories, or he may not, but that is not decisive; it is sufficient, in the present context, to conclude, as I do, that he is not obliged in law to reject it.

Dr. Bernstein valued Parklane's shares on a "going concern" basis. He analyzed the previous six years of operations, which, on the basis of the documents available to Bernstein, showed increasing sales but volatile and erratic earnings. Based upon his analysis of Parklane and three companies which Bernstein considered to be comparable to Parklane, he arrived at a capitalized earning power which, in Bernstein's judgment, was the single most important element in the valuation of Parklane. Lesser factors of 20% each were given to the average market prices of Parklane shares over the period January 1, 1974 through August 28, 1974, the time at which the announcement of the proposed merger was made; and to the book value per Parklane share, adjusted by the ratio of book value to market value of similar companies

Bernstein studied. The interaction of these three weighted factors results in a rounded value per common share of $1.40. Bernstein affidavit of April 29, 1980 at p. 16.

The expert witnesses and counsel for the appraisal group launch a broad-scale attack upon this conclusion. Bernstein's competence to testify in this field is denied. His reliance upon Parklane's audited financial statements is challenged, on the ground that the company's auditors did not exercise a sufficient degree of independence, and violated GAAP and GAAS. It is said that Bernstein departed from recognized New York appraisal standards, as set forth by the Court of Appeals in Endicott Johnson Corp. v. Bade, 37 N.Y.2d 585, 376 N.Y.S.2d 103 (1975). Bernstein is charged with having distorted or failed to understand a number of Parklane busi-

ness transactions bearing upon the fair value of its stock.

All these assertions and criticisms, which raise triable issues of fact (and which are in fact being tried in the appraisal proceeding) are vigorously disputed by Bernstein, the defendant's other experts, and counsel. For example, defendants and class counsel point out that while Endicott Johnson held that, in the circumstances of that case, the appraiser in determining fair value of the stock was not required to rely "to any large degree" on the market value of the common stock, 37 N.Y.2d 589, 376 N.Y.S.2d 108, Dr. Bernstein in the case at bar assigned only a 20% weight to that particular factor, giving the greatest weight to a factor which the appraisal group says should receive it. The proponents of the settlement contend that Weiner lacks Bernstein's

qualifications to give a competent opinion. They also stress that, as the appraisal proceedings progressed, Weiner's evaluations of fair value steadily increased: from $4.57 a share, an opinion Weiner expressed in June of 1975, to $10.11 a share, testified to in December of 1976, to the present valuation of $11.91 a share. The proponents invite the inference that Weiner is an unprincipled Hessian, quite prepared to say anything, and in whose opinion no confidence may be reposed. Weiner responds that he was obliged to revise his estimate as further information was developed during the course of the appraisal proceeding.

And so the arguments run, back and forth. They are all before the special referee, who will eventually decide them. I need not -- nay, I must not -- decide them here. The question for me is whether

the proposed settlement, which would make available to those stockholders who consented to the merger an additional payment at this time, is reasonable, having in mind the defendants' contention that the shares should be valued at a figure which would defeat any additional recovery (as noted, defendants' experts value the shares at $1.40, and the consenting stockholders received $2.00 per share at the time of the merger).

Fully recognizing that, at some future time, the appraisal proceedings may result in a substantially higher figure, I nonetheless conclude that the settlement falls within the zone of reasonableness, and should be approved.

Once again, the element of time is significant. The appraisal group contends that these proceedings should be held in abeyance until the appraisal proceeding

has been concluded. Class counsel reply that the appraisal group, for selfish tactical purposes, seeks to hold the class of consenting stockholders hostage. The attendant delay is of concern to Mr. Shore, who addressed the Court in these terms:

> "I would anticipate that it [the appraisal proceeding] would probably be, given the size of the record, a number of months past before a decision is rendered.
>
> "At that point I would say it's probably certain that the two factions in this room, that whoever loses or perhaps both of them will appeal to the Supreme Court. The loser, they then appeal to the appellate division and up to the Court of Appeals. And if there's some reason to reconsider, it's going to go back down again. This is going to go on for years.
>
> "Again, representing individuals, not the class, I think it's in the best interests of people to get a certain amount of money, a definitive amount now and resolve this once and for all so they can use this money as opposed to waiting another five or six years."

Mr. Wechsler, class counsel, makes the same argument on behalf of the class. In my judgment, there is much force to it. My own exposure to these litigious parties persuades me of the possibility, if not likelihood, of several more years' litigation before the appraisal proceeding is finally determined.

There is no need to examine in detail all the charges exchanged between the expert witnesses, or between counsel. However, one contention pressed by the appraisal group should be noted. It is said that class counsel have not exercised sufficient initiative in investigating the question of valuation. Had there been no appraisal proceedings, the situation might be different. But the negotiations giving rise to the proposed settlement began in October, 1977. They were initiated by the firm of Kaye, Scholer,

Fierman, Hays and Handler, then representing Parklane, at Parklane's request. Representatives of Kaye, Scholer and Kass, Goodkind conducted these negotiations between October, 1977 and January, 1978. By that time, much testimony had been taken in the appraisal proceedings, and was available to class counsel. In particular, class counsel were aware of Parklane's position, in the appraisal proceeding, that the fair value of the shares was less than the $2.00 paid to class members. Class counsel also had available, for their consideration, much of the arguments put forward by the appraisal group, in contradiction of that low figure. The appraisal group now charges class counsel with insufficient familiarity with the appraisal proceedings; but this criticism, in essence, is that class counsel do not see eye to eye with

counsel for the appraisal group on the manner in which the appraisal proceedings should be decided. The fact of the matter is that, as the result of class counsel's efforts, including the more recent amendment in respect of interest, a value per share which is over three times that testified to by defendants' expert in the appraisal proceeding has been negotiated. I hold that this settlement falls within the zone of reasonableness.

The proponents of the settlement urge other risks attendant upon further litigation. In particular, it is said that while the Supreme Court's decision in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), finally resolved against defendants, by collateral estoppel, the question of whether the proxy statement was materially false and misleading, questions of provable damages remain under

the holding of Mills v. Electric Auto-Lite, 396 U.S. 375, 389 (1969) ("in short, damages should be recoverable only to the extent that they can be shown"). Class counsel observe that since the market value of Parklane was lower than the $2.00 paid to Parklane shareholders in the freeze-out, "there might be no damages," Wechsler affidavit of May 2, 1980 at ¶24, although counsel is careful not concede the applicability of Mills to the case at bar. The appraisal group responds that this is an illusory issue. There is force to that contention, since Judge Duffy's analysis of the case in SEC v. Parklane Hosiery Inc., 422 F.Supp. 477 (S.D.N.Y. 1976) finds that the control group's ownership was such that the merger could not be thwarted; thus, the sole question facing a minority shareholder was whether to accept the by-out price or pur-

sue an appraisal proceeding. With respect to materiality of the omissions, Judge Duffy concluded that the nondisclosure was actionable because the information, likely to affect the by-out price offered for the stock, would have been important to the shareholders in deciding whether to accept the offered price rather than seek an appraisal remedy. On that analysis, it is arguable that the measure of damages is not measured by the difference between market value and the $2.00 tender, but rather between the $2.00 tender and what might be available by means of the appraisal remedy. In settlement negotiations, of course, counsel for Parklane argued that Mills required the Parklane shareholders to prove causation and damage, and that on the facts of the case they could not do so. Affidavit of Jay G. Strum, Esq., dated April 16, 1980 at ¶6.

On balance, I am skeptical of defendants' ability to sustain a defense based upon issues of causation or damages. But that is not fatal to the proposed settlement, since as discussed ante it constitutes an acceptable settlement of what is unquestionably a meaningful issue, namely, the fair value of the Parklane shares.

In consequence, I am prepared to approve the settlement in principle. Two questions remain: the amount of attorney's fees to be awarded, and whether the minor adjustments proposed by plaintiff Shore should be required as a condition of Court approval.

IV.

The Kass, Goodkind firm, as class counsel, requests an allowance of counsel fees and expenses in the amount of

$102,517. That amount includes out-of-pocket expenses in a total amount of $6,293.16. It appears from Mr. Wechsler's supporting affidavits that, had the firm billed for its services on a non-contingent basis, the fees would have been $149,891.25, exclusive of expenses. The amount claimed, $102,517, represents the $85,000 figure referred to in the amended stipulation of settlement, increased by the interest factor also provided for in that instrument.

Counsel's application is supported by affidavits which recite the time spent upon this litigation by partners of the firm, associates, and paralegals, and the hourly rates at which such time is customarily billed. The rate for senior partners is $150 per hour; for junior partners $125 per hour; for associates $85 per hour; and for law clerks and

paralegals $30 per hour. It is the application of these rates to the time devoted to the case that produces the "lodestar" figure of $149,891.25.

In concentrating first upon the time devoted to the litigation, and the hourly rate by which compensation is calculated, class counsel follow the formulation of City of Detroit v. Grinnell Corp., 485 F. 2d 448 (2d Cir. 1974).

The amount of class counsel's claimed compensation was specified in the notice of hearing sent to class members, and the evidentiary hearing now concluded was called to address that issue, as well as the reasonableness of the underlying settlement. No objector has questioned the standing of the Kass, Goodkind firm in securities class actions; or the reasonableness of the time devoted to this case; or the reasonableness of the

hourly rates upon which a non-contingent fee would have been based. Nor does the Court find any basis for questioning these factors. The Kass, Goodkind firm in general, and Mr. Wechsler in particular, are recognized as competent counsel in this field. The case presented complex questions of law; and the decision achieved in favor of the class on the collateral estoppel issue, first in the Second Circuit and then in the Supreme Court, was a significant ruling of first impression.

The question of substance is whether the total compensation requested by counsel represents a disproportionate share of the total settlement fund. In that regard, the appraisal group is critical of the extent to which class counsel benefits by the improved terms of the amended settlement, as opposed to the class members themselves.

The settlement fund, as a result of the revised terms, is increased from $205,000 to $258,000. That is an increase of $53,000. Class counsel would receive $102,517, instead of the $65,000 contemplated by the original settlement. Thus the allowance to counsel is increased by $37,517. The deduction of the allowance to counsel of $102,517 from the fund of $258,000 leaves $155,483 for distribution to the class. On the original settlement, $140,000 would have been available to the class (a fund of $205,000, less counsel's fees of $65,000). The amount available to counsel thus is increased by $15,483. It follows that counsel would receive 71% of the amount by which the settlement fund is increased, and the class would receive 29% of that increase. Another way of analyzing the figures is to say that, as the result of the revised settlement, counsel's

allowance is increased 58% (from $65,000 to $102,517), while the distribution to the class is increased by 11% (from $140,000 to $155,483).

Of course, those members of the appraisal group who have elected to opt out of the settlement have no interests which are diminished by an allowance to class counsel. But the Court has an independent obligation to evaluate the proper allowances to counsel, within the context of the overall settlement.

I intend no criticism of class counsel when I conclude that a more even distribution of the benefits secured by the amended settlement should be directed in this case. Class counsel, on their present application, receive the greater portion of those benefits as the result of a two-step process: their basic rate of compensation is raised from $65,000 to

$85,000; and that elevated base then becomes the trigger for an increased participation in the interest factor. I am fully aware that class counsel were required to defend the settlement throughout two years of additional litigation. While that litigation ran its course, counsel were required to render further services to the class, and both class members and counsel had to wait for the distributions contemplated by the original settlement. Counsel are clearly entitled to additional compensation, in respect of these further legal efforts; and it is fair that counsel receive some consideration with respect to the interest factor as well. On balance, however, I conclude that the $53,000 increment resulting from the renegotiation of the original settlement should be divided equally between class counsel and the class. One half of the $53,000 in-

crease is $26,500. When that amount is added to $65,000, the amount specified for counsel's fees and expenses in the original stipulation of settlement, an allowance to counsel of $91,500 results. I will enter an order approving payment of class counsel's fees and expenses in that amount. I appreciate that this amount is substantially less than the amount that class counsel would ordinarily charge; but this is one of the risks inherent in contingent fee litigation, and I have come to the conclusion that this particular figure is the proper one in all the circumstances.

V.

Mr. Shore and certain other claimants contend that the Court should condition its approval of the settlement agreement upon the defendants paying additional legal fees incurred by reason of their petition-

ing the Supreme Court for certiorari; and that the defendants be charged a prime rate of interest on the settlement fund during the ensuing delay, rather than the ten percent specified in the amended settlement. It is, of course, the fact that the prime rate has been in excess of ten percent for most of that period.

I decline to attach such conditions upon approval of the settlement. The general rule is that the court's function is limited to approving or rejecting the settlement as presented. In Argo v. Harris, 84 F.R.D. 646, 647-8 (E.D.N.Y. 1979), the court stated:

> "The sole question before this Court is whether the proposed settlement is fair, reasonable and adequate. Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972). If it is, the Court should approve the same; if it is not, the Court should disapprove the settlement and the parties should be restored to their respective positions

> prior to the settlement. It is not this Court's function 'to reopen and enter into negotiations with the litigants in the hope of improving the terms of the settlement to meet their respective objections; nor is it called upon to substitute its business judgment for that of the parties who worked out the settlement.' Levin v. Mississippi River Corporation, 59 F.R.D. 353, 361 (S.D.N.Y. 1973), aff'd on opinion below sub nom. Wesson v. Mississippi River Corporation, 486 F.2d 1398 (2d Cir. 1973), cert. denied, 414 U.S. 1112, 94 S.Ct. 843, 38 L.Ed.2d 739 (1973); Blank v. Talley Industries, Inc., 64 F.R.D. 125, 129 (S.D.N.Y. 1974)."

While there are isolated instances of a district court approving a class action settlement conditioned upon some additional sweeteners, Goldsholl v. Shapiro, supra, at 1300; Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 53, 54 (D.Mass.1963), the beneficiaries of those particular court-directed adjustments were claimants in the litigation. In the case at bar, the sug-

gestion is that the defendants pay directly to class counsel the fees resulting from defendants' prosecution of an unsuccessful appeal. Such a condition would run counter to the traditional American rule of costs. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

With respect to the interest rate, the ten percent figure specified in the amended stipulation of settlement is reasonable in the circumstances. While the prime rate has been higher than ten percent, there was no obligation to pay pre-judgment interest at all in the original settlement, and the ten percent figure, arrived at by a process of negotiation, has brought about a significant increase in the size of the settlement fund. The Court will not disturb the result of that negotiation.

CONCLUSION

This Court approves this settlement because it will permit a distribution, without further delay, to consenting shareholders of an amount which, in the totality of circumstances, falls within the zone of reasonableness. Members of the appraisal group, fully protected under the terms of the settlement, are neither affected nor prejudiced by its terms, and may pursue their full remedies, both in the appraisal proceeding and this Court. There is no just cause why the former shareholders of Parklane should not receive the benefits of a reasonable settlement at this time.

Settle order and judgment in conformity with this opinion.

Dated: New York, New York
August 1, 1980

/s/ CHARLES S. HAIGHT, JR.
CHARLES S. HAIGHT, JR.
U.S.D.J.

FOOTNOTES

1. Class counsel are Messrs. Kass, Goodkind, Wechsler and Labaton. Stuart D. Wechsler, Esq., has the matter in charge.

2. Counsel for defendants are Messrs. Goldman, Cooperman & Levitt. Jack B. Levitt, Esq., has the matter in charge.

3. Counsel for the appraisal group are Messrs. Cuccia & Oster and Messrs. Wisehart, Friou & Koch. Frederick J. Cuccia, Esq., and Arthur M. Wisehart, Esq., have the matter in charge.

4. Counsel for the appraisal group stress that in their brief to the Court of Appeals, class counsel represented "to counsel for the proposed intervenors [the appraisal group] that notice would be given to them for forwarding to their clients," Wisehart affidavit of April 7, 1980 at ¶10. Apparently this was not done. It would have been preferable if class counsel had acted in conformity with their representation. Instead, notice was disseminated in the manner described ante. But it is clear that, once imperfections in the notice machinery manifested themselves, effective remedies were taken. See n.5, post.

5. By order dated April 11, 1980, the Court extended the time to file notices of exclusion to and including April 18. The letter of defendants' counsel to the Court of April 12 recites that defendants would not

oppose an application for filing after that time, on behalf of any member of the appraisal group making "a good faith denial of notice or knowledge...." No such applications have been received.

6. The appraisal group places principal reliance upon In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979); Pettway v. American Cast Iron Pipe Co., 576 F. 2d 1157 (5th Cir. 1978); and two Second Circuit cases, Saylor v. Lindsley, supra, and Upson v. Otis, 155 F.2d 606 (2d Cir. 1946). They are inapposite. In General Motors the Seventh Circuit expressed its belief "that the conduct of the negotiations was relevant to the fairness of the settlement and that the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion." 594 F.2d at 1124. There were, however, in the record sufficient indications of irregular conduct of the negotiations to arouse the appellate court's concern. Thus it was apparent that the settlement presented to the trial court by the Illinois Attorney General was either (1) negotiated without the permission of other class counsel in the action, as specifically required by the court's first pretrial order; or (2) negotiated by the Attorney General's office in a capacity other than class counsel in the action. Secondly, the class settlement was reached early in the action, only two months after class certification in a complex and far-reaching suit had been served, "to tell from the record how fully informed the Attorneys General

may have been about the value of the claims they were surrendering," id. at 1128, an uncertainty all the more troubling because the settlement agreement contemplated the abandonment of the prosecution of the claim of a number of claimants originally included in the class. Ibid. These troublesome factors bear no resemblance to the case at bar.

In Pettway, the Fifth Circuit dealt with a situation where class representatives wished to prosecute an appeal which class counsel considered should not be taken. The Court of Appeals held that the trial court abused its discretion in denying the representatives' motion to substitute class counsel for purposes of appealing the trial court's judgment. The court observed generally that "[w]ere the class attorney to treat the named plaintiff as the exclusive client, the interests of other class members might go unnoticed and unrepresented." 576 F.2d at 1176. In consequence, class counsel's "duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members." Ibid. No one can quarrel with these propositions, but the case at bar does not present an analogous problem. To be sure, there are differences of opinion between those members of the class who are members of the appraisal group and those who are not; but the appraisal group is represented by its own counsel, and this Court granted the appraisal group the limited right of intervention which

it is vigorously pursuing. It is, of course, the fact that counsel for the appraisal group were not invited to participate in the negotiations culminating in the proposed settlement. But the Court is not required to close its eyes to the practical realities. This is not a case of absentee class members going unrepresented, or having their interests prejudiced by the actions of class counsel inattentive to their claims, or inhibited by a conflict of interest. At the time of the settlement negotiations in this case, the appraisal group and defendants were at daggers drawn in the state court appraisal proceeding. The appraisal group, acting through its counsel, was clearly committed to a course of action entirely inconsistent with the sort of settlement contemplated on behalf of the majority of Parklane stockholders who had tendered their shares. The interests of the appraisal group members have been adequately protected throughout.

In Saylor v. Lindsley, supra, the Second Circuit reversed the district court's approval of a derivative suit settlement, where it appeared that the plaintiff's attorney failed to inform his client of settlement negotiations, did not advise the client before signing a stipulation of settlement on his behalf, and did not give the plaintiff sufficient opportunity to develop the basis for his objection to the settlement. In point of fact, the plaintiff in Saylor strenuously objected to the settlement in its entirety. Further-

more, plaintiff's counsel had failed to conduct discovery concerning, or manifest an interest in, a theory of liability under the federal securities laws which Judge Friendly quite clearly considered had substantial potential merit. See 456 F.2d at 903-4. In the case at bar, class counsel kept plaintiff Shore closely advised of the settlement discussions; Shore approves the settlement in principle, subject to relatively minor adjustements, and specifically rejects the objections put forward by the appraisal group; the extensive record generated by the state court appraisal proceedings furnishes a sufficient basis for passing upon the fairness of the proposed settlement; and the additional theory of liability class counsel is accused of disregarding is highly dubious. See discussion under Point III, infra.

Upson v. Otis, holds that the record was insufficient to sustain the district court's approval of the settlement of a stockholders' derivative suit. The Second Circuit stated generally: "To justify judicial sanction of such a settlement, the fiduciaries must make a fairly detailed disclosure of the evidence which, on a trial, they would use defensively." 155 F.2d 614-615. In the case at bar, that disclosure takes the form of the defendants' evidence, primarily the testimony of expert witnesses, adduced at the appraisal proceeding. See Point III, infra.

7. Fifty percent of the class responded to the notice. That is a creditable figure, given the litigation delays.

8. The New York Business Corporation Law, §626 (McKinney's 1963) provides:

> "(a) An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates.
>
> "(b) In any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law.
>
> "(c) In any such action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort."

See also Amelia v. Consolidated Edison Co., 73 N.Y.S.2d 263 (Sup.Ct. N.Y. 1947), aff'd, 273 App.Div. 755, 75 N.Y.S.2d 513 (1st Dept. 1947) (former stockholders of corporation which was merged into

defendant corporation could not after surrendering stock to defendant for proffered price, bring action in derivative capacity as stockholders).

9. The appraisal group is highly critical of Steven Shore's emergence as counsel to his father, seeming to regard him as a malevolent eminence grise whose presence pollutes the proposed settlement. I cannot understand why sons, if professionally qualified to do so, should not be permitted to advise their fathers. Quantities of advice, not always competent, flow in the opposite direction.

10. But see the novels of Mary McCarthy.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

74 Civ. 4986-CSH

LEO M. SHORE,

Plaintiff,

- against -

PARKLANE HOSIERY COMPANY, INC., and HERBERT N. SOMEKH,

Defendants.

JUDGMENT AND ORDER

WHEREAS:

A. On May 12, 1978, the attorneys for the parties hereto executed and filed with this Court a stipulation of settlement ("Stipulation") which manifested the parties' agreement as to the terms and implementation of a proposed settlement of this action. On February 28, 1980, the Stipulation was amended, among other things, to

increase the settlement fund by adding interest at the rate of 10% per annum accruing retroactively from July 1, 1978 until the date of payment and compounded annually.

B. On February 20, 1979, this Court entered an order:

1. Approving the form of notice of the proposed settlement ("Notice") to be sent to the members of the class.

2. Directing the plaintiff to notify members of the plaintiff class of the terms of the proposed settlement, and their right to file proofs of claim to the settlement fund or to object and to request exclusion from the class.

C. On November 21, 1978, this Court granted limited rights of intervention to certain class mem-

bers also participating in an appraisal proceeding in state court ("Appraisal Group") and the Court of Appeals held on September 12, 1979 that the Court's order granting limited intervention was not appealable.

D. The Notice was amended to include objections of the named plaintiff by order of the Court dated February 14, 1980 ("February Order"). The February Order further:

1. Directed defendants to notify members of the plaintiff class of the terms of the settlement, and their right to file proofs of claim to the settlement fund or to object to the proposed settlement and to publish the Notice;

2. Scheduled a hearing on the proposed settlement for April 18,

1980, to hear any objections and to finally determine the fairness, adequacy, and reasonableness of the settlement embodied in the Stipulation as amended;

3. Required class members desiring to get out of the settlement to file and serve a statement of election not later than April 8, 1980; and

4. Required that all objections to the proposed settlement be filed in writing on or before April 8, 1980.

E. The notice to the class, as directed by the order, advised each member of the class, pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure, that: (1) the judgment in this litigation would include all members of the class who had not excluded themselves therefrom would

have the opportunity to show cause at the settlement hearing why the proposed settlement embodied in the Stipulation was not fair, reasonable, adequate, and in the best interests of the class.

F. On March 18, 1980, the Appraisal Group moved for further intervention for the purposes of moving for orders disqualifying counsel for the class, disqualifying the class representative, requiring new notice to be sent to the members of the class, and enjoining the hearing on the proposed settlement. This Court granted the motion on April 14, 1980; denied the motion to enjoin the hearing and directed that the other relief be considered among the issues to be raised at the hearing on the proposed settlement.

G. The date for filing statements of election opting out of the settlement was extended by leave of Court to April

18, 1980.

H. As shown in the affidavits of Jack B. Levitt, sworn to April 17, 1980, Ronald Miller, sworn to April 17, 1980, Daniel Foley, Jr., sworn to March 13, 1980, and Vinson J. Friedman, sworn to April 17, 1980, which were filed with this Court, the provisions of the order relating to notice to the class have been complied with in all respects and each member of the class has been afforded the best notice practicable under the circumstances, including individual notice to all who could be identified through reasonable effort.

I. On June 27, 1980, the scheduled hearing on the proposed settlement was held and the proponents appeared on behalf of the proposed settlement. The Appraisal Group and the named plaintiff appeared at the hearing and objected to terms of the proposed settlement. After lengthy argu-

ment at the hearing, the objections to the settlement were taken under advisement. No other members of the class appeared at the hearing on June 27, 1980 for the purpose of objecting to the proposed settlement, and no other objections to the proposed settlement were timely filed.

J. On August 1, 1980, this Court issued an opinion, finding the terms and conditions of the proposed settlement, as amended, to be fair, reasonable, adequate, and in the best interests of the class; overruling all objections to the proposed settlement; and awarding attorneys' fees and expenses to the attorneys for plaintiffs.

NOW, THEREFORE, after due deliberation and consideration of the prior proceedings herein,

IT IS ORDERED, Adjudged and Decreed:

1. The proposed settlement of this

action as embodied in the Stipulation, as amended, is fair, reasonable, adequate, and in the best interests of the class and is hereby approved.

2. All objections to the proposed settlement are rejected and are hereby overruled.

3. The parties are directed to implement and consummate the settlement of these actions in accordance with the terms and provisions of the Stipulation, as amended.

4. This action is dismissed on the merits, with prejudice and without costs, as to the named plaintiff and all members of the certified class, except those who have timely requested to be excluded therefrom (as listed on Exhibit A to this Judgment and Order) and those who have timely filed Statements of Election (as listed on Exhibit B to this Judgment and

Order).

5. All defendants in this action are forever discharged from any and all liability under each and every claim which has been or could have been asserted in this action, except as otherwise provided in the Stipulation, as amended, arising out of or in any way relating to any acts, facts, transactions, omissions, or matters alleged or referred to, directly or indirectly, in any of the pleadings herein, and from any other claim for violations of federal, state, or common law in connection with the subject matter embraced in any such pleading.

6. Plaintiff and all members of the class, except for those who have duly requested to be excluded therefrom as set forth in Exhibits A and B, are permanently barred and enjoined from commencing or prosecuting any claim or claims individual-

ly, derivatively, or on behalf of a class, which were asserted or could have been asserted in this action, including, without limitation, any claims arising out of or in any way relating to any acts, facts, transactions, omissions, or matters alleged or referred to, directly or indirectly, in any of the pleadings filed herein, and from commencing or prosecuting any other claims for violations of federal, state, or common law in connection with the subject matter embraced in any such pleading.

7. Class counsel, Kass, Goodkind, Wechsler & Labaton, are awarded the sum of $91,500.00 for fees and expenses incurred in connection with this litigation, it being determined that these fees and expenses are fair and reasonable.

8. The attorneys' fees and expenses set forth above are to be disbursed

within thirty (30) days after this Judgment and Order become final.

9. This Court reserves jurisdiction over this action for the purposes of hearing and determining any application arising out of or in connection with the Stipulation, as amended, including, without limitation, applications concerning the interpretation, implementation, or consummation of the terms and provisions of the Stipulation and the amendment thereof.

10. This reservation of jurisdiction shall not delay the entry of this Judgment and Order, and the Clerk of the Court is directed to enter forthwith this judgment of dismissal of the complaint in this action, with prejudice and without costs, in accordance herewith.

11. Within thirty (30) days after this Judgment and Order become final, counsel for Parklane is authorized to

direct the disbursement to each member of the settlement class whose claim has been allowed his pro rata share of the net settlement fund, in accordance with the provisions of the Stipulation, as amended. Within fourteen (14) days after completion of the disbursement of the net settlement fund, counsel for Parklane shall file with the Court a final report with respect to such disbursement and claims administration.

Dated: New York, New York
September 9, 1980

/s/ Charles S. Haight
United States District Judge

JUDGMENT ENTERED 9/11/80

/s/ Raymond F. Burghardt
CLERK

Exhibit A
p. 1

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p. 2

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Saleh Mouallem & Victoria Mouallem
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p. 4

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Belle Yanover
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EXHIBIT B

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EXHIBIT B
p. 2

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APPENDIX C

APPENDIX C

A-91

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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74 Civ. 4986 (CSH)

LEO M. SHORE,

Plaintiff,

- against -

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants.

ORDER AMENDING JUDGMENT

Defendants, by letter dated October 1, 1980, having made application to amend the Judgment and Order entered herein on September 11, 1980, to provide that distribution of settlement payments pursuant to paragraphs 8 and 11 thereof be made within 30 days after the date on which such Judgment and Order was entered, but in the event an appeal is taken, within fifteen

days after the determination of such appeal and the expiration of the time within which any party may appeal from such determination, and there being no objection made thereto, it is

ORDERED that paragraph 8 of the Judgment and Order heretofore entered herein on September 11, 1980, be amended to read as follows:

> "The attorneys' fees and expenses set forth above are to be disbursed within thirty (30) days after the date on which the Judgment and Order is entered, but in the event an appeal is taken, within fifteen (15) days after the determination of such appeal and the expiration of the time within which any party may appeal from such determination"; and it is further

ORDERED that paragraph 11 of the said Judgment and Order be amended to read as follows:

> "Within thirty (30) days after this Judgment and Order is entered, but in the event an appeal is taken, within fifteen

(15) days after the determination of such appeal and the expiration of the time within which any party may appeal from such determination, counsel for Parklane shall direct the disbursement to each member of the settlement class whose claim has been allowed his pro rata share of the net settlement fund, in accordance with the provisions of the Stipulation, as amended. Within fourteen (14) days after completion of the disbursement of the net settlement fund, counsel for Parklane shall file with the Court a final report with respect to such disbursement and claims administration."; and it is further

ORDERED that this Order shall not enlarge or extend the time within which an appeal may be taken by any party from the Judgment and Order entered on September 11, 1980 as modified herein.

Dated: New York, New York
October 10, 1980.

/s/Charles S. Haight, Jr.
United States District Judge

APPENDIX D

APPENDIX D

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of February, one thousand nine hundred and eighty-one.

Present:
Hon. Ellsworth A. Van Graafeiland,
Circuit Judge
Hon. Amalya L. Kearse, Circuit Judge
Hon. Charles E. Stewart, District Judge*

No. 80-7849

----------x

Leo M. Shore,
Plaintiff-Appellee,

v.

Parklane Hosiery Company, Inc. and
Herbert N. Somekh,
Defendants-Appellees,

v.

Angelo C. Papalardo, et al.,
Limited Intervenors-Appellants.

----------x

O R D E R

*Of the Southern District of New York, sitting by designation.

Appeal from a final judgment and order of the United States District Court for the Southern District of New York (Haight, J.) entered September 11, 1980, approving the proposed settlement of a class action.

The district court, following a hearing and review of the papers filed by the objectors, defendants and the class, found that the proposed settlement was fair, adequate and reasonable; accordingly, the court approved the settlement. The court gave the objectors, who constituted a relatively small minority of the class, the opportunity of opting out of the settlement so that they could pursue their individual state and federal remedies if they so desired.

A district court's approval of a proposed class action settlement will not be overturned unless there has been an abuse of discretion. In re Traffic Executive

Association - Eastern Railroads 627 F.2d 631 (2d Cir. 1980). This standard of review follows the strong federal policy of encouraging and supporting the settlement of litigation. Williams v. First National Bank, 216 U.S. 582 (1910); City of Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1974). Our review of the record discloses no abuse of discretion in this case. Accordingly, we affirm.

Entered March 18, 1981

/s/
Hon. Ellsworth A.
Van Graafeiland

/s/
Hon. Amalya L. Kearse

/s/
Hon. Charles E. Stewart

APPENDIX E

APPENDIX E

28 U.S.C. §1254(1) provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

15 U.S.C. §78aa provides in pertinent part:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

Section 10(b) of the Securities Exchange Act of 1934 (hereinafter the "1934 Act"), 15 U.S.C. §78j(b) provides:

> It shall be unlawful for any person directly or indirectly, by the of use of any means or instrumentality interstate commerce or of the mails, or of any facility of any national securities exchange -- . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in

contravention of such rules and regulations as the Commission may prescribe or appropriate in the public interest or for the protection of investors.

Section 13(a) of the 1934 Act, 15 U.S.C. 78m(a) provides:

"(a) Every issuer of a security registered pursuant to section 781 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security --

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 781 of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual report (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange."

Section 14(a) of the 1934 Act, 15 U.S.C. 78n(a) provides:

> "(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicity any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title."

Section 20(a) of the 1934 Act, 15 U.S.C. § 78t(a) provides:

> "(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulations thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

Rule 23(e) of the Federal Rules of Civil Procedure provides:

> "(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval

of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."